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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 FRANK ALLEN,
18 Plaintiff,
19 v.
20 RADIO SHACK CORPORATION, et al.,
21 Defendants.

22 Case No.: CV 11 3110 WHA
23 ECF No.: 3:11-cv-03110-WHA
24 Judge: Hon. William H. Alsup

25 DEFENDANT RADIOSHACK
26 CORPORATION'S NOTICE OF MOTION
27 AND MOTION FOR SUMMARY JUDGMENT
28 OR, IN THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF

29 Date: December 20, 2012
30 Time: 8:00 a.m.
31 Dept: Courtroom 8, 19th Floor

32 Complaint Filed: May 20, 2011
33 Trial Date: February 19, 2013

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1 **I. NOTICE OF MOTION AND MOTION**

2 NOTICE IS HEREBY GIVEN that on December 20, 2012, at 8:00 a.m., in Courtroom 8,
 3 located on the 19th floor of the above-mentioned Court, at 450 Golden Gate Avenue, San
 4 Francisco, California, Defendant RADIOSHACK CORPORATION will and hereby does move,
 5 pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary
 6 judgment or, in the alternative, partial summary judgment, on the Complaint filed by Plaintiff
 7 FRANK ALLEN, and removed to federal court on June 23, 2011. This Motion is made on the
 8 grounds that there are no triable issues as to any material fact and that Defendant is entitled
 9 to judgment as a matter of law.

10 This Motion is based upon this Notice, the accompanying Memorandum of Points and
 11 Authorities, the supporting Declarations of Tracy Thompson¹ ("Thompson Dec."), Hani
 12 Alzaghami ("Alzaghami Dec."), Donna Ocampo ("Ocampo Dec."), James Peterson ("Peterson
 13 Dec."), and Todd Schrader ("Schrader Dec."), with exhibits, the pleadings and papers filed in
 14 this action, and upon such other evidence or argument as may be presented to the Court at or
 15 before the hearing on this Motion.

16

17 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

18 **A. INTRODUCTION**

19 Frank Allen, a Store Manager employed by RadioShack, was terminated on April 27,
 20 2010, for his failure to protect company assets. The incident that precipitated his termination
 21 occurred on April 20, 2010. That evening, Allen's manager, Donna Ocampo, made a visit to
 22 Allen's Tenderloin-area store with Regional Sales Director Basem Aybaf. Upon arrival at the
 23 store, Ocampo and Aybaf found stacks of bills and rolls of coins in the manager's desk

24

25 ¹ Excerpts from the deposition transcripts of Plaintiff Frank Allen ("Allen Dep."), Donna
 26 Ocampo ("Ocampo Dep."), Amy Tam ("Tam Dep."), Hani Alzaghami ("Alzaghami Dep."),
 27 Rosetta Holmes ("Holmes Dep."), Gregory Pattakos ("Pattakos Dep."), David Gonsolin
 28 ("Gonsolin Dep."), Nabor Baca ("Baca Dep."), Shaan Smith ("Smith Dep."), Thomas Nabozny
 ("Nabozny Dep."), and Carlos Venegas ("Venegas Dep.") are attached as Exhibits 2, 3, 4, 5,
 6, 7, 8, 9, 10, 11 and 12, respectively, to the Thompson Dec.

1 drawer, rather than in the cash register where company policy required cash to be kept. In
 2 addition, they observed a store associate, Rosetta Holmes, walking through the store with a
 3 large wad of cash in her pocket; when questioned about it, Holmes acknowledged that the
 4 cash amounted to about \$1000. In a discussion with Allen the next day, April 21, Allen took
 5 the position with Ocampo that he should not be held responsible for what had occurred in his
 6 store, as he was not there at the time of the visit. Less than one month earlier, Ocampo had
 7 issued a written warning to Allen for his failure to comply with various company loss
 8 prevention policies and procedures. The warning clearly put Allen on notice that any further
 9 violations would result in further disciplinary action, up to and including immediate termination.
 10 After review and consultation with Aybef and Loss Prevention, Ocampo made the decision to
 11 terminate Allen's employment.

12 In this lawsuit, Plaintiff claims disparate treatment based on race and national origin²;
 13 retaliation; discrimination based on age; hostile work environment (harassment) based on
 14 race and age; wrongful termination in violation of public policy; and intentional infliction of
 15 emotional distress. Each claim fails as a matter of law.

- 16 • Plaintiff's age and race discrimination claims fail because Plaintiff has no evidence
 17 that the decision to terminate his employment was made because of his age or his
 race.
- 18 • Plaintiff's claims of hostile environment based on his age and race fail because,
 19 among other reasons, the alleged acts of harassment were nothing more than
 routine personnel management actions, were neither severe nor pervasive, and
 20 were unconnected to any protected classification.
- 21 • Plaintiff's retaliation claim fails because Plaintiff never engaged in any protected
 22 activity and, even if he had, there is no evidence of a causal connection between
 that activity and his termination.
- 23 • Plaintiff's wrongful termination claim fails because he cannot show that he was
 24 terminated because of his age or race, or because he engaged in protected activity.
- 25 • Plaintiff's claim for intentional infliction of emotional distress fails because he has no
 26 evidence that RadioShack engaged in any extreme and outrageous conduct.

27 ² Although styled as a claim based on both race and national origin, Plaintiff has not produced
 28 evidence of any claim based on his national origin. Accordingly, for purposes of this motion,
 RadioShack will treat this claim as one for race discrimination only.

1 Because there is no evidentiary support for any of Plaintiff's claims, RadioShack
 2 respectfully requests that this Court grant RadioShack's motion and enter summary judgment
 3 in its favor.

4 **B. STATEMENT OF ISSUES TO BE DECIDED**

5 (1) Whether RadioShack is entitled to summary judgment on all of Plaintiff's claims
 6 for relief;

7 (2) Whether RadioShack is entitled to partial summary judgment on any of the
 8 following claims for relief:

9 (a) First – Disparate Treatment Based on Race/National Origin in violation of
 10 California Fair Employment and Housing Act ("FEHA");

11 (b) Second -- Retaliation in Violation of the FEHA;

12 (c) Third – Discrimination Based on Age in Violation of the FEHA;

13 (d) Fourth -- Hostile Work Environment (Harassment) in Violation of the
 14 FEHA;

15 (e) Fifth -- Wrongful Termination in Violation of Public Policy;

16 (f) Sixth -- Intentional Infliction of Emotional Distress ("IIED");

17 (3) Whether RadioShack is entitled to partial summary judgment on Plaintiff's claim
 18 for punitive damages.

19 **C. STATEMENT OF FACTS**

20 **1. RadioShack Maintained Policies and Procedures Applicable to its
 21 Employees and Store Operations.**

22 RadioShack is a consumer electronics specialty retailer with its corporate headquarters
 23 in Fort Worth, Texas. In 2010, RadioShack operated over 4,400 stores throughout the United
 24 States, with approximately 30,000 employees. Schrader Dec. ¶ 2. RadioShack maintains
 25 policies reflecting its commitment to providing a workplace that is free from discrimination,
 26 harassment and retaliation, and its policies reflect its equal employment opportunity
 27 philosophy. Ocampo Dec. ¶¶ 33-34, Exhs. 11-12. Employees are routinely informed of
 28

1 RadioShack's policies, which are also available through RadioShack's "Answers Online"
 2 intranet. *Id.*; Allen Dep. 404:16-405:4.

3 Loss prevention and asset protection are an important part of a RadioShack store
 4 manager's job, and compliance with the Company's policies and procedures regarding loss
 5 prevention was stressed by RadioShack. Peterson Dec. ¶¶ 2-3; Ocampo Dec. ¶ 9. Each
 6 store manager is responsible for ensuring that store employees are familiar and comply fully
 7 with all applicable Company policies and procedures, and is held accountable for that
 8 compliance. *Id.* Allen Dep. 155:20-156:6, 158:21-159:12, 404:16-405:4. Among other
 9 duties, store managers (including Allen, an experienced store manager) were required to
 10 follow established cash handling procedures, to complete a weekly physical "cage count" of
 11 all high-end merchandise kept locked in the "Security Cage" in the back stockroom, to
 12 properly authorize and document refunds, to report and monitor cash shortages, and to
 13 confirm that all appropriate merchandise security devices were functional and being used.
 14 Allen Dep. 153:9-18, 153:25-154:10, 155:20-156:6, 165:12-20; Exhs. 1, 5; Nabozny
 15 Dep. 64:10-14, 78:11-25, 82:17-83:13, 91:8-15, 97:18-98:4, 103:23-104:8, 111:25-112:19,
 16 123:8-25, 138:1-139:7; Ocampo Dec. ¶ 9.

17 In addition, RadioShack emphasized store appearance through the use of established
 18 uniform standards for its stores known as "Non-Negotiable Standards," which were intended
 19 to ensure consistency in physical appearance, merchandising, and cleanliness, among other
 20 items, in all stores. Schrader Dec. ¶ 5; Alzaghami Dec. ¶ 15, Exhs. 12-16; Ocampo Dec. ¶ 24.
 21 All store managers were expected to adhere to and be held accountable for compliance with
 22 the Non-Negotiable Standards, which were the focus of regular store visits conducted by
 23 District Managers (DMs), and occasionally by their Regional Sales Directors (RSDs), in order
 24 to assess their stores' ongoing compliance. *Id.*

25 **2. Plaintiff's Employment with RadioShack and Documented Company Policy
 26 Violations.**

27 Allen's store, Store 3830, was part of RadioShack's District 538, which included about
 28 22 stores in San Francisco. Allen Dep. 29:17-30:1; Alzaghami Dec. ¶¶ 1-2. Allen became a

1 store manager in 1998, and had many years of experience. Allen Dep. 155:15-18; Nabozny
 2 Dep. 123:15-25. Throughout much of his employment, Allen reported to Hani Alzaghami, who
 3 was the DM for District 538 from 2003 until February 2010.³ Alzaghami Dec. ¶ 2. Among
 4 other duties, a DM is responsible for the oversight of sales team recruitment and
 5 development, store appearance or “image,” and the professional appearance and conduct of
 6 the store manager and team members. Schrader Dec. ¶¶ 5, 7; Alzaghami Dec. ¶ 15,
 7 Exhs. 12-16. As DM for Store 3830, Alzaghami raised these issues with Plaintiff. *Id.*

8 Allen had a well-documented history of violations of various company policies and
 9 procedures relating to asset protection and loss prevention, among other issues. These
 10 issues were observed and documented not only by Alzaghami, but also by the Loss Prevention
 11 Managers (“LPMs”) responsible for District 538. Alzaghami Dec. ¶¶ 3-17, 19-20, Exhs. 1-19;
 12 Ocampo Dec. ¶¶ 11-19, Exhs. 2-7. For example, on February 21, 2003, Alzaghami issued,
 13 and Allen signed, a “written reprimand” citing Allen’s “poor operational controls, failure to
 14 follow daily report procedure and policy violation for cash procedures.” Alzaghami noted that
 15 LPM Tom Nabozny, who had visited the store the previous day, had “found a box in the
 16 manager’s desk, which contained \$300. Money was used for change to avoid running to the
 17 bank daily to get change.” Alzaghami was unequivocal: “Mr. Allen: I need you to follow
 18 company policy for all cash procedures. Cash must be kept in the cash drawer and
 19 monitored by you at all times. This must be done immediately and I’m holding you
 20 accountable to follow all company policies at all time.” Alzaghami Dec. ¶¶ 4-6, Exhs. 1-3;
 21 Allen Dep. 175:19-178:10, 180:20-181:13, 198:4-23, 199:20-202:22, 203:15-25, Exh. 2.

22 On April 16, 2007, Loss Prevention wrote Allen up for “failure to follow Company
 23 compliance operational procedures” and, in a memorandum subsequently signed by Plaintiff
 24 and his staff – advised Plaintiff that he “needs to understand that by just ignoring these
 25 operational procedures, he is showing that he is not being responsible for maintaining the

26
 27 ³ From the fall of 2009 until around February 2010, Alzaghami reported to Donna Ocampo,
 28 who – for a few months – was the acting RSD and Ocampo, in turn, reported to acting Area
 Vice President Greg Pattakos. Alzaghami Dec. ¶ 2; Ocampo Dec. ¶ 3.

1 security of company assets. The kind of negligent attitude that is displayed in this area
 2 reflects poorly on Allen's managerial skills." Alzagham Dec. ¶¶ 12-13, Exhs. 9-10.

3 Over the years, Alzagham and Loss Prevention documented repeated violations of
 4 company policy and procedures, including missing signatures on refund tickets, an open back
 5 room door and unlocked security cage, inventory losses and failure to follow inventory action
 6 plans, among other issues. Alzagham Dec. ¶¶ 7-14, 16, Exhs. 4-11, 17. Store 3830 was
 7 located in an area where crime and shoplifting were not uncommon, making it particularly
 8 important for Allen to adhere to RadioShack's loss prevention policies and procedures. Allen
 9 Dep. 140:4-13, 189:9-18.

10 **3. Acting Area Vice President Greg Pattakos is Displeased by the
 11 Appearance of Plaintiff's Store During his December 2009 Visit.**

12 In December 2009, during a pre-Christmas tour of Bay Area stores by senior
 13 RadioShack management, Pattakos, Ocampo, the Area Loss Prevention Director, and the
 14 Area Human Resources Director visited Store 3830 for about 20 minutes. Ocampo Dec. ¶ 4;
 15 Allen Dep. 37:23-38:12, 38:25-40:21, 41:1-42:3, 42:6-22, 50:9-51:18, 63:14-17, 72:15-18.
 16 Alzagham had warned all the store managers in his district about senior management's
 17 impending store inspections. Allen Dep. 47:15-48:11, 48:20-49:22. Allen, who had never met
 18 Pattakos, was "on alert" and had cleaned up his store. *Id.* at 50:9-51:18, 54:17-55:14.

19 According to Allen, Pattakos came into Allen's store, introduced himself, looked Allen
 20 "up and down", and asked in a "very hostile" tone "how long have you been with
 21 RadioShack?" When Allen answered, Pattakos responded: "You may have a year with
 22 RadioShack." Allen Dep. 51:19-52:5, 58:9-59:9. Pattakos then inquired whether Allen was
 23 "running the store" to which Allen responded "[n]o, my district manager tell (sic) me what
 24 I need to do . . ." *Id.* at 59:10-60:21. Pattakos expressed his concern about whether Allen's
 25 DM was doing his job, including "coaching" and "helping [Allen] to run the store. *Id.* at 60:2-
 26 21.

27 After spending "no more than a minute" on the sales floor, Pattakos "went straight to
 28 the back room" with Allen and the LPM, where they talked about rearranging the store, the

1 disorganization and messiness of the store and back room, and security improvements. *Id.* at
 2 62:4-64:17. Pattakos told Allen he would return to reinspect the store. Allen Dep. 97:6-10.
 3 Nothing was said by Pattakos during the visit about Allen's race or age. *Id.* at 58:9-64:17,
 4 89:14-16. The next day, Pattakos shared his observations from the tour with Alzaghami,
 5 including his unhappiness with the appearance of Plaintiff's store. Alzaghami Dec. ¶ 17.

6 **4. Alzaghami Holds District Meeting to Discuss Preparation for Pattakos's
 7 Return Visit, and upon his Return Pattakos Finds that Allen's Store Looks
 "Great".**

8
 9 Shortly after Pattakos's store visits, Alzaghami met with his store managers to discuss
 10 the results of those visits and to prepare for Pattakos's impending follow-up inspection.
 11 Ocampo was also present at the meeting. At that meeting, Allen shared with the assembled
 12 store managers his experience with Pattakos. Alzaghami Dec. ¶ 18; Ocampo Dec. ¶ 5; Allen
 13 Dep. 69:8-76:7, 77:20-78:5, 79:17-23, 81:14-24, 82:12-83:21, 84:2-85:10. Allen made no
 14 mention of his race or age, and neither Ocampo nor Alzaghami understood him to be
 15 complaining about unlawful discrimination or harassment by Pattakos. *Id.*

16 As promised, Pattakos returned to Store 3830 a few weeks later with his replacement,
 17 David Charles, and Ocampo. Allen Dep. 96:4-98:9, 99:11-100:11, 103:7-108:9; Ocampo Dec.
 18 ¶¶ 6-7; Alzaghami Dec. ¶ 21. Pattakos was pleasant, polite, professional and friendly, and
 19 complimented Allen that Store 3830 "looked great." Allen Dep. 103:13-104:22. Plaintiff never
 20 saw or interacted with Pattakos again, as Pattakos returned to his position in Fort Worth, and
 21 no longer had any responsibility for District 538 or Allen's store. Ocampo ¶ 7; Allen Dep.
 22 108:10-15, 110:17-21.

23 **5. Newly Appointed DM Ocampo Discusses Staffing Issues at Store 3830
 24 with Plaintiff.**

25 In late February 2010, Donna Ocampo took over as the new DM of District 538, and
 26 Allen began reporting directly to Ocampo. Ocampo Dec. ¶ 2. While she was DM, Allen saw
 27 Ocampo three or four times for store visits. Allen Dep. 113:10-25. As DM, Ocampo – like
 28 Alzaghami before her – was responsible for the oversight of the appearance or "image" of

1 Allen's store, as well as the professional conduct of Allen and his team members. Ocampo
 2 Dec. ¶¶ 24, 29-21, Exh. 10.

3 Allen asserts that during a March 2010 store visit, Ocampo observed his sales
 4 associates at work, and told Allen that she was not pleased with the store appearance.
 5 According to Allen, Ocampo told him that "the store was not in good shape, it was not
 6 according to planogram," that he had the "wrong people," that the store had the "wrong
 7 image," that "we need to upgrade the employees," and that "you need some better employees
 8 in this store". Plaintiff never asked Ocampo what she meant by the term "wrong people" or by
 9 her direction to find "better employees". Allen Dep. 224:5-7, 226:4-9. Ocampo also
 10 commented on the store's displays and merchandising. Allen Dep. 222:3-226:9, 227:8-
 11 229:22. Allen claims that Ocampo talked "mostly" about two female African-American
 12 employees, that she had questioned "their ability on the floor", and that she had asked Allen
 13 "[c]an you find some better people?" *Id.*

14 Finally, Allen claims that a week later Ocampo told him "if you don't get rid of ... your
 15 employees, then I will get rid of you," and "the only thing I care about is making sure that my
 16 son is taken care of." *Id.* at 229:23-233:13, 234:6-17. Allen never asked Ocampo which
 17 employees she was talking about or what she meant by the reference to her son. *Id.*
 18 According to Allen, following that conversation, all further discussions with Ocampo
 19 concerned "sales performance, sales and stuff like that". Ocampo made no other comments
 20 to Allen about the store employees. Allen Dep. 235:5-16.

21 **6. The Events Leading to Allen's April 27, 2010 Termination.**

22 On March 9, 2010, LPM David Gonsolin visited Store 3830 and documented Allen's
 23 failure to meet RadioShack's Non-Negotiables. Ocampo Dec. ¶¶ 11-16, Exhs. 2-5; Gonsolin
 24 Dep. 62:5-71:13, 73:6-76:21. Gonsolin noted "numerous cash shortages in the last several
 25 months" which Allen "had not reported ... and had no explanation as to why they are
 26 happening," a missed mid-February "cage count", and merchandise not secured properly in
 27 the cage or on the sales floor, among other issues. *Id.* Gonsolin shared his findings with
 28 Ocampo, and on March 23, 2010, Ocampo gave Allen a Corrective Action Record ("CAR")

1 based on these violations. Ocampo Dec. ¶¶ 13-15, 17, and Exhs. 2-4, 6. Allen signed the
 2 CAR without written comment although the form afforded him an opportunity to do so.
 3 Ocampo Dec. ¶ 17, Exh. 6.

4 Early in the evening on April 20, 2010, Ocampo and RSD Aybef⁴ visited Store 3830.
 5 By the time they arrived, Allen had already left for the day. Ocampo Dec. ¶ 18. Ocampo and
 6 Aybef went into the back room and discovered stacks of bills and rolls of coins lying in an
 7 unzipped pouch in one of the drawers of the manager's desk, which was also unlocked. *Id.*
 8 This was a clear violation of company policy, which required that all cash be kept in the cash
 9 register drawer. *Id.*; Gonsolin Dep. 143:13-144:11, 145:147:7. Ocampo and Aybef also
 10 spoke with store employee Rosetta Holmes. While speaking to Holmes, Ocampo noticed a
 11 large wad of bills in Holmes's pocket. Holmes showed her the cash, which amounted to
 12 approximately \$1000. Ocampo Dec. ¶ 19; Holmes Dep. 110:18-113:3. Holmes stated that
 13 she had had several large cash transactions and was going to put the cash in the back room.
 14 Ocampo immediately instructed Holmes to prepare and make a back deposit. *Id.*

15 Ocampo expected that Allen, as the store manager, would comply with RadioShack's
 16 asset protection policies "whether he's in the store or whether he's out of the store." Ocampo
 17 Dep. 45:11-19, 46:4-15; 59:24-60:4; Ocampo Dec. ¶ 18. Ocampo was particularly concerned
 18 about the unsecured cash, given the numerous unexplained cash shortages Loss Prevention
 19 had found at Allen's store over the preceding several months, which had been noted in the
 20 recent CAR. Ocampo Dec. ¶ 16, Exh. 5; Ocampo Dep. 66:7-67:11. Having heard from
 21 Holmes that Ocampo had been in the store the prior evening, Allen called Ocampo the next
 22 day. During the call, Allen informed Ocampo that he always kept cash in the desk drawer,
 23 that the drawer was locked when he left the store that night, and that he had no responsibility

24 ⁴ For the first month or so as DM, Ocampo reported to Regional Sales Director ("RSD") Todd
 25 Schrader. Schrader was new to the Region, and in early April 2010, RadioShack transferred
 26 Basem Aybef, then an RSD in Minneapolis, to assist Schrader on a temporary basis in the
 27 management of his Region. Aybef assumed responsibility for several of Schrader's districts,
 28 including District 538, for about six weeks. Schrader Dec. ¶ 3; Ocampo Dec. ¶ 8. Upon
 Aybef's arrival, Ocampo reported to him until about May 21, 2010, when Aybef left and
 relocated to Texas. *Id.*

1 for what his staff did in his absence. Allen Dep. 192:1-16, 194:11-195:7, 195:19-23, 441:14-
 2 442:7; Ocampo Dec. ¶ 21; Ocampo Dep. 60:9-61:1.

3 Ocampo made the decision to terminate Allen's employment based on her
 4 observations at the store on April 20, 2010, and the recent CAR. Ocampo Dec. ¶¶ 20-22.
 5 She discussed the situation with Aybef and Gonsolin, and both supported her decision.
 6 Ocampo Dec. ¶ 20, 22, 25; Gonsolin Dep. 172:23-173:2, 175:8-12.

7 On April 27, 2010, Ocampo and Gonsolin went to Store 3830, and Ocampo informed
 8 Allen that he was being terminated for failing to protect RadioShack's assets. Ocampo Dec.
 9 ¶ 22, and Exh. 8; Allen Dep. 442:21-443:6. Before leaving the store, Allen made a comment
 10 to the effect of "Thank you for freeing a slave." Allen Dep. 444:23-445:21; Ocampo Dec. ¶¶
 11 23. Ocampo had no idea what Allen meant by this remark, did not interpret the comment to
 12 be a complaint of race discrimination, and was "appalled" because Plaintiff's race had nothing
 13 to do with "holding him responsible for not protecting company assets." *Id.*; Ocampo Dep.
 14 106:23-107:7, 108:5-23. Ocampo was particularly sensitive to issues of racism toward
 15 African-Americans as her long-time partner and the father of her child is African-American,
 16 and her young son is half African-American. Ocampo Dec. ¶ 25; Ocampo Dep. 113:10-114:5.

17 D. LEGAL ARGUMENT

18 1. **Plaintiff's First Claim for Disparate Treatment Discrimination Based on 19 Race and Third Claim for Age Discrimination Fail as a Matter of Law 20 Because Plaintiff Cannot Make Out a *Prima Facie* Case of Race or Age 21 Discrimination.**

22 To establish a *prima facie* case of discrimination under the FEHA, a plaintiff must show
 23 that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he
 24 experienced an adverse employment action; and (4) similarly situated individuals outside his
 25 protected class were treated more favorably, or there are other circumstances surrounding
 26 the adverse employment action that give rise to an inference of discrimination. *Peterson v.*
Hewlett-Packard Co. (9th Cir. 2004) 358 F.3d 599, 603; *Johnson v. United Cerebral*
Palsy/Spastic Children's Found. of Los Angeles (2009) 173 Cal.App.4th 740, 754. Plaintiff
 27 admitted that he knows of no other employee who kept cash in the manager's desk drawer
 28

1 instead of the cash register. Allen Dep. 400:20-401:2. Lacking any evidence that Plaintiff
 2 was treated less favorably than similarly situated younger or non-African-American
 3 employees, Plaintiff cannot satisfy even this threshold showing.

4 Even if Plaintiff could make this showing, his claims still must be dismissed as a matter
 5 of law because: (1) Plaintiff's failure to comply with RadioShack's asset protection policies
 6 and procedures undeniably constitutes a legitimate, nondiscriminatory reason for
 7 RadioShack's decision to terminate Plaintiff's employment; and (2) Plaintiff lacks "specific,
 8 substantial" evidence to show that RadioShack's reasons were a pretext for either race or age
 9 discrimination. See *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F. 3d 1217, 1221 (once
 10 an employer articulates a legitimate, non-discriminatory reason for an adverse employment
 11 action, the employee must produce "specific, substantial evidence of pretext" for a more
 12 invidious motive) (italics added).

13 **2. Plaintiff's Claims for Race and Age Discrimination Fail Because
 14 RadioShack had a Legitimate, Nondiscriminatory Reason for Terminating
 Plaintiff.**

15 RadioShack must meet a slight burden of *articulation* rather than persuasion –
 16 RadioShack's stated reasons are presumptively valid. See *McDonnell Douglas Corp. v.
 Green* (1973) 411 U.S. 792, 805. RadioShack is not required to prove that it made a wise
 17 decision, the best decision, or even a fair decision; to meet its burden, RadioShack need only
 18 show that the decision to terminate Plaintiff was based on factors other than Plaintiff's race or
 19 age. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 358 (summary judgment proper where
 20 employee offered no evidence that the real reason for the employer's decisions was
 21 discriminatory *animus*); *Hersant v. California Dep't of Social Servs.* (1997) 57 Cal.App.4th
 22 997, 1005 (plaintiff brought an action for "discrimination," not "general unfairness"). The
 23 relevant inquiry is not whether the decision was objectively correct or incorrect; it is whether
 24 RadioShack believed, when it made decision to terminate Plaintiff's employment, that Plaintiff
 25 had engaged in the misconduct at issue. *Everroad v. Scott Truck Sys.* (7th Cir. 2010) 604
 26 F.3d 471, 478 n.2. Here, the undisputed evidence demonstrates that:
 27
 28

- 1 • RadioShack's Store Managers – like Plaintiff – are responsible for loss prevention
2 and asset protection in their stores, and are expected to train and supervise their
3 staff with respect to compliance with company policies and procedures [Ocampo
Dec. ¶ 9; Alzagham Dec. ¶ 3; Allen Dep. 412:18-22, Exh. 5];
- 4 • Plaintiff's District Managers and RadioShack's Loss Prevention personnel
5 documented Plaintiff's repeated non-compliance with various loss prevention and
6 operational policies and procedures [Alzagham Dec. ¶¶ 3-16, 19, 20; Ocampo Dec.
¶¶ 11-19];
- 7 • DM Alzagham gave Plaintiff a written reprimand on February 21, 2003, admonishing
8 Plaintiff to "follow company policy" and keep cash in the "cash [register] drawer"
[Alzagham Dec. ¶¶ 4-6];
- 9 • Plaintiff was issued a Corrective Action Record ("CAR") on March 23, 2010, noting
10 unexplained cash shortages, unsecured merchandise, and a missing cage count
11 that had been documented during a March 9, 2010, store visit by Loss Prevention
12 Manager Gonsolin. The CAR warns that "[f]ailure to achieve the required
improvement will lead to additional disciplinary action up to and including
termination" [Ocampo Dec. ¶ 17]; and
- 13 • On April 20, 2010, less than a month after the CAR had been issued, DM Ocampo
14 and RSD Aybef discovered cash in Plaintiff's desk drawer and also observed a
sales associate removing a large sum of additional cash from her pocket [Ocampo
Dec. ¶¶ 18, 19].

16 Because RadioShack's reason for its termination decision is compelling on its face,
17 Plaintiff can survive summary judgment on his discrimination claims only by producing
18 specific, substantial evidence that the articulated reason was a pretext for unlawful
19 discrimination. *Guz*, 24 Cal. 4th at 361 ("the pertinent statutes do not prohibit lying, they
20 prohibit discrimination"); see also *Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.3d 736, 745
21 (affirming summary judgment to employer when plaintiff failed to show pretext by coming
22 forward with evidence that discrimination most likely motivated her termination). To satisfy
23 this standard, Allen "must do more than raise an issue whether the employer's action was
24 unfair, unsound, wrong or mistaken, because the overriding issue is whether discriminatory
25 animus motivated the employer." *Johnson*, 173 Cal.App.4th at 755. Absent such evidence,
26 RadioShack is entitled to judgment as a matter of law. Mere speculation and conjecture
27 cannot be regarded as "substantial responsive evidence" to overcome a legitimate business
28 reason. *Id.* Here, even if Allen could establish a *prima facie* case, summary judgment is

1 warranted because Allen lacks specific, substantial evidence of pretext or discriminatory
 2 animus.

3 Despite being written up by Alzaghami, Nabozny and Gonsolin for various policy
 4 violations and performance deficiencies, Allen does not believe that any of them harbored any
 5 bias against him due to his race or age; Allen asserts that only Ocampo and Pattakos were
 6 biased.⁵ Allen Dep. 110:22-111:11, 239:3-8, 266:24-267:6.

7 As to Ocampo, Plaintiff asserts that on two occasions while visiting his store, Ocampo
 8 made comments regarding the “image” of his store employees and their “abilities on the floor”,
 9 and told Plaintiff he had the “wrong people” and needed to “upgrade” his employees.⁶
 10 Plaintiff – who never asked Ocampo to explain what she meant – points to these comments
 11 as evidence of Ocampo’s bias. However, on their face, Ocampo’s observations – which
 12 RadioShack does not dispute for purposes of this motion – appear consistent with her
 13 legitimate management responsibility for ensuring that her stores were properly staffed with
 14 competent employees, and that the store’s appearance, and that of the employees, was
 15 professional and in keeping with RadioShack standards. Ocampo Dec. ¶¶ 24, 30.

16 Indeed, Allen’s former DM, Alzaghami, had addressed these same “image” and staffing
 17 issues with Allen – advising Allen regarding his “store image” and the need to “develop a
 18 better staff” – over the years that Allen reported to him. Alzaghami Dec. ¶ 15. These
 19 management concerns had nothing to do with Allen’s race or age or that of his employees.
 20 Rather, it was common at RadioShack to assess both store “image” and whether employees
 21 presented a professional “image.” *Id.* Although Alzaghami used these same terms in

22 ⁵ Allen has never met, or even heard of, RSD Aybef. Nor does Allen believe that former area
 23 HR manager Shaan Smith (who is African-American) was biased against him. *Id.* at 116:20-
 24 117:5, 117:13-20, 119:8-12, 467:2-10. Allen admits that he does not think Ocampo was
 25 biased against him because he is African-American, that he has never heard Ocampo say
 anything derogatory about anybody’s age, and does not know if she is biased against him
 because of his age. Allen Dep. 236:9-12, 248:20-24, 249:5-14.

26 ⁶ Other than these alleged comments by Ocampo, Allen admitted that he heard no derogatory
 27 comments about his age or race while employed at RadioShack. Allen Dep. 35:21-36:16,
 36:22-37:10; 89:14-16, 207:12-21, 236:9-12, 238:22-239:8, 248:25-249:14, 266:24-267:16,
 467:2-10.

1 discussing staffing and store appearance, Allen did not believe that Alzaghami bore him any
 2 discriminatory animus, while coming from Ocampo, Plaintiff construed those terms as
 3 discriminatory. Allen Dep. 30:24-31:10, 34:17-35:8, 112:8-10, 112:16-19. Given the context,
 4 no reasonable inference can be drawn that Ocampo's reference to "image" had anything to do
 5 with age or race.

6 Allen also points to a *single comment* made by former acting Area Vice President
 7 Pattakos in the course of a store visit that left Pattakos clearly unhappy with the store's
 8 appearance: "You may have a year with RadioShack." Allen Dep. 59:10-60:25, 63:9-11, 64:1-
 9 17. There is no evidence that Pattakos's comment – assuming he even said it – refers to
 10 Plaintiff's *age or race*. Rather, it reflects Pattakos's severe frustration and displeasure with
 11 regard to the store's appearance, and could have been made to any store manager of any
 12 age or race – especially one who asserted (as Allen did when he met Pattakos) that he was
 13 not responsible for the appearance of his store, and instead blamed his DM. Moreover, any
 14 attempt to ascribe discriminatory intent to Pattakos is undermined by his follow-up visit to
 15 Plaintiff's store several weeks later when, according to Plaintiff, Pattakos told Plaintiff the
 16 store looked "great."

17 Even if Pattakos's alleged comment rises to the level of a "stray remark," however, the
 18 Ninth Circuit has made clear that a single stray comment, particularly one untethered to the
 19 decision constituting the adverse action, is insufficient to create a triable issue of fact with
 20 respect to a claim of discrimination.⁷ *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996)
 21 113 F.3d 912, 918-19; see also, *Sirridge v. Bar-S Food Co.* (9th Cir. 1996) 138 Fed. Appx.
 22 948, 949 (evidence of comments by COO that he wanted plaintiff to retire and that plaintiff
 23 was "long in the tooth" could not overcome evidence of insubordination).

24 Nor can Plaintiff raise a triable issue by arguing that Ocampo was mistaken or acting
 25 inappropriately in holding him accountable for events that occurred in his store when he was
 26

27 ⁷ Pattakos's comment was made some five months before Allen's termination, and it is
 28 undisputed that Pattakos played no role in that decision; he was neither consulted nor
 informed. Ocampo Dec. ¶¶ 25.

1 not there, or that she was in error in believing that his keeping cash in the back drawer was a
 2 violation of policy. It is not the role of the Court to conduct an independent assessment of the
 3 reasons for Plaintiff's termination, or to decide whether RadioShack's perception of the
 4 relevant events was objectively correct. See e.g., *Kariotis v. Navistar Intern. Transp. Corp.*
 5 (7th Cir. 1997) 131 F.3d. 672, 678 (cited with approval in *Guz*, 24 Cal. 4th at 358) (holding
 6 that the plaintiff could not establish pretext by picking apart the employer's investigation,
 7 noting that “[t]his is probably the classic case where a court must observe its limitations and
 8 ‘not sit as a super-personnel department that reexamines an entity’s business decision. No
 9 matter how medieval a firm’s practices, no matter how high-handed its decisional process, no
 10 matter how mistaken a firm’s managers, the laws barring discrimination do not interfere.”)

11 Nor does RadioShack have to show that Allen actually engaged in the conduct that led
 12 to his termination; only that “it had a good faith belief that [Allen] violated [RadioShack’s]
 13 policies”. *Granillo v. Exide Technologies, Inc.* (C.D. Cal. 2011) 2011 WL 2535112, *15-16.
 14 Courts “only require that an employer honestly believed its reasons for its actions, even if its
 15 reason is foolish or trivial or even baseless.” *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002)
 16 281 F.3d 1054, 1063; *Guz*, 24 Cal. 4th at 358; see also *King v. United Parcel Service* (2007)
 17 152 Cal.App.4th 426, 436 (“[i]t is the employer’s honest belief in the stated reasons for firing
 18 an employee and not the objective truth or falsity of the underlying facts that is at issue in a
 19 discrimination case”). Allen’s evidence simply does not satisfy the “specific and substantial”
 20 requirement, and therefore Allen cannot proceed to trial on his claims for race and age
 21 discrimination.⁸

22

23 ⁸ Allen may also claim that two African-American employees and two Hispanic employees
 24 were also terminated in the weeks following his termination. However, the evidence shows
 25 that one of the African-American employees voluntarily transferred to another store and did
 26 not leave the company; the other was terminated for failing to report for a mandatory
 27 inventory; and the Hispanic employees were terminated for attendance issues and admitted
 28 retail theft. Tam Dep. 82:11-24, 93:17-94:5; Holmes Dep. 94:7-96:12, 98:19-99:23; Baca
 Dep. 29:20-32:18, 35:10-22. Two of the terminated employees – one African-American and
 one Hispanic – each testified that he/she did not believe that RadioShack had discriminated
 against them. [Holmes Dep. 102:9-11; Baca Dep. 42:8-12.]

1 **3. Plaintiff's Second Claim for Retaliation Fails as a Matter of Law.**

2 To establish of retaliation under the FEHA, a plaintiff must show that: (1) he engaged in
 3 a protected activity; (2) he was thereafter subjected to an adverse employment action by his
 4 employer; and (3) there is a causal link between the protected activity and the adverse
 5 employment action. *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 928; *Yanowitz*
 6 v. *L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1042. Here, Plaintiff cannot show either that he
 7 engaged in protected activity or, even if he did, that there was a causal connection between
 8 that activity and Plaintiff's termination. *Chen v. County of Orange* (2002) 96 Cal.App.4th 926,
 9 948-49. The *McDonnell-Douglas* burden-shifting analysis applies to this claim. *Brooks*,
 10 229 F.3d at 928.

11 Allen asserts that he "complained" about Pattakos to Alzaghami and Ocampo at the
 12 manager meeting called by Alzaghami to discuss preparation for Pattakos's return visit to
 13 reinspect the stores. There is no evidence that Plaintiff reported any belief that Pattakos's
 14 conduct, while perhaps rude and overbearing, constituted unlawful harassment or
 15 discrimination. Allen Dep. 69:8-72:20, 73:25-74:12, 76:1-7, 84:16-20; Alzaghami Dec. ¶ 18;
 16 Ocampo Dec. ¶ 5. For this reason, Allen's alleged "complaint" does not, as a matter of law,
 17 rise to the level of protected activity necessary for a claim of retaliation. See *Mayfield v. Sara*
 18 *Lee Corp.* (N.D. Cal. Jan. 13, 2005) 2005 WL 88965, *8 (no protected activity where
 19 employee never communicated to employer that he believed unfair treatment was racially
 20 motivated); *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1987) 813 F.2d 1406, 1412 (finding
 21 employee complaint regarding scheduling change did not constitute protected activity where
 22 plaintiff never communicated any belief that the change was discriminatory); *Barber v. CSX*
 23 *Distrib. Servs.* (3rd Cir.1995) 68 F.3d 694, 701-702 (finding employee complaint regarding
 24 unfair treatment did not constitute protected activity where employee never reported a belief
 25 that age was the motivating reason).

26 Allen also points to Ocampo's alleged statements that Allen needed to "get rid of" store
 27 employees because they "did not fit the image" RadioShack wanted, and that if he did not do
 28 so, Allen would be terminated. Allen concedes that Ocampo made no reference to any

1 employee's age or race during those discussions [Allen Dep. 222:3-226:9, 226:13-233:13],
 2 and the context in which the statements were allegedly made does not, as a matter of law,
 3 support a reasonable inference that Ocampo was alluding to either age or race. Allen's
 4 conclusion that Ocampo was targeting African-American and/or Hispanic employees is, in
 5 short, nothing other than rank speculation, and his "pushing back" against Ocampo's
 6 supposed instruction does not constitute protected activity.

7 Finally, Allen's parting comment following his termination thanking Ocampo "for freeing
 8 a slave" cannot support a retaliation claim for at least two reasons. First, and most
 9 fundamentally, the comment was made only after Allen had been informed of his termination.
 10 Second, even Allen himself concedes that his comment had nothing to do with perceived
 11 racial discrimination, but rather reflected his feeling that he had devoted a great deal of his
 12 time, energy and focus to RadioShack, and had made it a "top priority," and perhaps had
 13 sacrificed other parts of his life in doing so. [Allen Dep. 444:23-445:21.]

14 Under the burden shifting analysis, even assuming that Allen can make out a *prima*
 15 *facie* case of retaliation based on Ocampo's statements, RadioShack had a legitimate
 16 nonretaliatory reason for Allen's termination: his documented and repeated failure to protect
 17 company assets. *Unt v. Aerospace Corp.* (9th Cir 1985) 765 F.2d 1440, 1447 (employer
 18 presented "well documented performance deficiencies"). The evidence supporting the
 19 decision to terminate includes the following:

- 20 • LPM Gonsolin documented Plaintiff's failure to comply with company policies during
 21 a visit to Plaintiff's store on March 9, 2010 [Ocampo Dec. ¶¶ 13-15];
- 22 • The "Settlement Over/Short Report" dated March 9, 2010 for Plaintiff's store
 23 showed a shortage of \$141.05 for the one-month period starting on February 9,
 2010 [Ocampo Dec. ¶ 16];
- 24 • Plaintiff was issued a Corrective Action Record ("CAR") on March 23, 2010, noting
 25 unexplained cash shortages, unsecured merchandise, and a missing cage count
 26 previously documented by Gonsolin during the March 9, 2010, visit. The CAR
 27 warns Plaintiff that "[f]ailure to achieve the required improvement will lead to
 28 additional disciplinary action up to and including termination" [Ocampo Dec. ¶ 17];
 and

- 1 • A few weeks later, on April 20, 2010, Ocampo and RSD Aybef discovered cash in
 2 Plaintiff's desk drawer and observed a sales associate removing about \$1000 in
 3 cash from her pocket [Ocampo Dec. ¶¶ 18, 19].

4 In the face of this compelling and undisputed evidence, Plaintiff has not come forward
 5 with even a shred of evidence, much less specific and substantial evidence, to suggest that
 6 the reason articulated by RadioShack for the termination decision was a pretext for unlawful
 7 retaliation. Accordingly, Allen's claim of retaliation must fail.

8 **4. Plaintiff's Fourth Claim for Hostile Work Environment Harassment Fails as
 9 a Matter of Law.**

10 To establish hostile work environment harassment, Allen must show that he was
 11 subjected to conduct that was ***both objectively and subjectively so severe or pervasive***
 12 that it altered the conditions of his employment and created a work environment that was
 13 abusive, and that this conduct was based on Allen's race or age. *Lyle v. Warner Brothers*
 14 *Television Productions* (2006) 38 Cal. 4th 264, 284; *Etter v. Veriflo Corp.* (1998)
 15 67 Cal.App.4th 457, 465-67. In order to satisfy the threshold standard of severity or
 16 pervasiveness, Allen must produce evidence of something more than "occasional, isolated,
 17 sporadic, or trivial" acts. *Lyle*, 38 Cal. 4th at 283. Even a plaintiff who "subjectively perceives
 18 the workplace as hostile or abusive will not prevail ... if a reasonable person..., considering all
 19 the circumstances, would not share the same perception." *Hughes v. Pair* (2009) 46 Cal. 4th
 20 1035, 1044 (citations omitted). Moreover, "petty differences" and "festering disputes" that are
 21 unrelated to one's protected class are not, as a matter of law, sufficient to warrant trial.
Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1110.

22 Here, the inadequacy of Allen's harassment allegations is readily apparent.
 23 Regardless of what Allen *subjectively* perceives, ***no reasonable juror*** could find the conduct
 24 alleged against Pattakos and Ocampo (taken in the context of the undisputed facts, below) to
 25 be ***objectively severe or pervasive, or tied to Allen's age or race***. Indeed:

- 26 • Allen alleges harassment based on a *single* ambiguous comment made by
 27 Pattakos during his first store visit, which was followed a few weeks later by a
 28 second store visit during which Pattakos told Allen that his store "looked great" –
 the last time Plaintiff ever heard from Pattakos;

- 1 • Allen admits that Pattakos never made any reference to his race [Allen Dep. 89:14-16];
- 2
- 3 • Allen accuses Ocampo of harassment for using routine management terms like
- 4 “image” when discussing staffing issues on two occasions – terms that his former
- 5 DM Alzaghami also used [Alzaghami Dec. ¶ 15]. Allen does not believe that
- 6 Alzaghami was biased against him [Allen Dep. 207:18-21];
- 7
- 8 • Allen did not ask Ocampo what she meant when, in the course of observing
- 9 Plaintiff’s sales staff at work in the appropriate discharge of her management
- 10 duties, she allegedly told him that he had the “wrong people” in the store, that “it’s
- 11 the wrong image”, and “questioned their ability on the floor”, and all discussions
- 12 with Ocampo after she made these comments concerned “sales performance,
- 13 sales and stuff like that”, and Ocampo made no further comments to Allen about
- 14 the employees in his store [Allen Dep. 223:5-224:7, 225:17-21, 226:4-9, 235:5-10];
- 15
- 16 • Allen admits that he would be “guessing” if he tried to interpret Ocampo’s alleged
- 17 comment that “the only thing I care about is making sure that my son is taken care
- 18 of” [Allen Dep. 230:19-231:7, 232:6-233:13];
- 19
- 20 • Regarding Ocampo’s scrutiny of his store operations, Allen testified that almost all
- 21 of the approximately 22 store managers in Ocampo’s district complained among
- 22 themselves about her oversight as DM, and shared Allen’s opinion that Ocampo
- 23 was looking for things that were “wrong” [Allen Dep. 249:15-253:10, 254:1-255:20];
- 24
- 25 • Ocampo has a long-time partner who is African-American, and a child who is half
- 26 African-American [Ocampo Dec. ¶ 25];
- 27
- 28 • Allen admits that he does not think Ocampo is biased against him because of race,
- 29 and that while employed at RadioShack he heard no derogatory comments about
- 30 his race or African-Americans, apart from the “image” comments attributed to
- 31 Ocampo [Allen Dep. 35:21-36:16, 36:22-37:10, 236:9-12];
- 32
- 33 • Allen admits that he does not know if Ocampo harbored any age bias against him
- 34 [Allen Dep. 249:5-14];
- 35
- 36 • Allen admits that he never heard anyone at RadioShack make derogatory
- 37 comments about age; [Allen Dep. 239:3-8] and
- 38
- 39 • There is no evidence of a culture of bias at RadioShack. Not a single witness who
- 40 was deposed ever heard anyone at RadioShack make any derogatory comments or
- 41 jokes about African-Americans or older workers. [Allen Dep. 36:11-16, 37:7-10,
- 42 239:3-8; Baca Dep. 44:23-45:5; Gonsolin Dep. 166:7-168:25; Holmes Dep. 28:12-
- 43 29:24; Venegas Dep. 65:9-12, 66:14-23; 67:9-14, 72:1-4, 72:13-15.

Regarding Pattakos’s alleged harassment, Plaintiff’s evidence of his single ambiguous comment cannot satisfy the “severe or pervasive” standard. *Aguilar v. Avis Rent A Car*

1 System, Inc. (1999) 21 Cal. 4th 121, 130-31 (“occasional, isolated, sporadic, or trivial” acts
 2 are usually not enough to create a hostile environment; rather a plaintiff must show a
 3 concerted pattern of harassment of a repeated, routine or a generalized nature.”) (*citing*
 4 *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 610)

5 As to Ocampo, any speculation by Allen that the facially neutral terms he claims
 6 Ocampo used in the course of two conversations concerning store appearance and store
 7 employees were actually “code words” reflecting unlawful bias based on race and/or age is
 8 insufficient as a matter of law to defeat summary judgment. Courts recognize that there is a
 9 high potential for abuse with respect to claims based on “code words” that are allegedly
 10 biased but are facially neutral. See e.g., *Beaubrun v. Thomas Jefferson Univ.* (E.D. Pa. 2008)
 11 578 F. Supp. 2d 777, 784 (to defeat summary judgment where a plaintiff relies on code
 12 words, some overt connection to a protected classification is required; mere speculation about
 13 a connection is insufficient). Plaintiff has not shown the requisite overt connection to either
 14 his age or race.

15 Finally, Ocampo’s two discussions relating to staffing, her inspection of and visits to
 16 Allen’s store, and her decision to terminate Allen’s employment for his violation of
 17 RadioShack’s asset protection policies, constitute routine personnel management actions and
 18 cannot, as a matter of law, constitute harassment. *Janken v. GM Hughes Elec.* (1996)
 19 46 Cal.App.4th 55, 64-65, 79 (“commonly necessary personnel management actions such as
 20 hiring and firing, promotion or demotion, [and] performance evaluations . . . do not come
 21 within the meaning of harassment”) (italics added) (cited with approval in *Reno v. Baird*
 22 (1998) 19 Cal. 4th 640, 643.) See also *Hampe v. Dept. of Corrections* (E. D. Cal. 2000) 2000
 23 U.S. Dist. LEXIS 15435, *16-17 (the plaintiff’s claims of harassment failed where they were
 24 based on such incidents as her locker area having been ransacked, increased scrutiny of her
 25 work, exclusion from staff meetings, removal from an assignment, being shoved by her
 26 supervisor in the hallway, being indirectly accused of a workplace violation, and being
 27 continuously followed and reported on by a “surrogate” of her supervisor). Allen’s evidence of
 28 “harassment” is similarly defective and judgment on this claim is therefore warranted.

1 **5. Plaintiff's Wrongful Termination Claim Fails as a Matter of Law.**

2 Allen's wrongful termination claim is entirely derivative of his discrimination and
 3 retaliation claims under the FEHA, and fails for the same reasons those claims fail. See
 4 *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229 (affirming summary judgment;
 5 because plaintiff's FEHA claim failed, his claim for wrongful termination in violation of public
 6 policy failed as well).

7 **6. Plaintiff's Claim for Intentional Infliction of Emotional Distress Fails
 8 Because He Has No Evidence of Extreme and Outrageous Conduct.**

9 The elements of a claim for intentional infliction of emotional distress are (1) extreme
 10 and outrageous conduct (2) intended to cause or done in reckless disregard of causing
 11 (3) severe emotional distress, and (4) actual and proximate causation of emotional distress.
 12 *Cervantes v. J.C. Penney Co., Inc.* (1979) 24 Cal. 3d 579, 593. RadioShack's conduct must
 13 be so extreme as to "exceed all bounds of that usually tolerated in a civilized community." *Id.*
 14 See also *Hughes*, 46 Cal. 4th at 1051 (defendant's conduct is outrageous when it is so
 15 extreme as to "exceed all bounds of that usually tolerated in a civilized community").

16 Allen has alleged no conduct on the part of RadioShack that could reasonably be
 17 construed as extreme and outrageous. It is well settled that personnel management activities
 18 such as hiring, firing, discipline, and criticism that are a normal part of the employment
 19 relationship do not constitute outrageous conduct, even if intentional or malicious.
 20 *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 25; *Janken*, 46 Cal.App.4th at 55 (a simple pleading
 21 of personnel management activity is insufficient to support a claim for intentional infliction of
 22 emotional distress, even if improper motivation is alleged).

23 Plaintiff's evidence of harassment is also insufficient to establish extreme or
 24 outrageous conduct. *Hughes, supra*, 66 Cal. 4th at 1051 (threatening comments, such as "I'll
 25 get you on your knees eventually. I'm going to fuck you one way or another" "fall far short of"
 26 the standard for establishing outrageous conduct). Moreover, because Plaintiff's harassment
 27 and discrimination claims fail as a matter of law, they are necessarily insufficient to support an
 28 IIED claim. See *Tennison v. Circus Circus Enterprises, Inc.* (9th Cir. 2001) 244 F.3d 684, 691

1 (finding that a jury's rejection of a sexual harassment claim made any error in failing to
 2 instruct on intentional infliction of emotional distress harmless); *Jones v. Dept. of Corrections*
 3 and *Rehabilitation* (2007) 152 Cal. App. 4th 1367, 1382 ("Because we conclude Jones did not
 4 establish discrimination her causes of action for emotional distress fail to the extent they are
 5 tethered to the discrimination claim.") Clearly, the conduct alleged by Allen comes nowhere
 6 close to meeting the requisite standard, and summary judgment in RadioShack's favor must
 7 be granted on this claim.

8 **7. Plaintiff Cannot Make Out a Claim for Punitive Damages.**

9 As a threshold matter, a plaintiff seeking punitive damages must prove by clear and
 10 convincing evidence that defendant acted with malice, oppression, or fraud. This is an
 11 extremely high standard, which Allen cannot meet. Even if he could, for a corporate employer
 12 such as RadioShack to be held liable for punitive damages, Allen must be able to show either:
 13 (1) that an officer, director, or managing agent is "personally guilty of oppression, fraud, or
 14 malice"; or (2) that an officer, director, or managing agent authorized or ratified fraudulent,
 15 malicious, or oppressive conduct or acted with a conscious disregard for plaintiff's rights or
 16 safety. Cal. Civ. Code § 3294 (b). *College Hosp., Inc. v. Superior Court* (1994) 8 Cal. 4th
 17 704, 724 n.11 ("[P]unitive damages are not assessed against employers on a pure
 18 *respondeat superior* basis. Some evidence of fault by the employer itself is also required.");
 19 *Fisher, supra*, 214 Cal.App.3d at 621 n.13 (punitive damages required ratification through an
 20 officer, director, or managing agent).

21 A corporate defendant is entitled to prevail on a motion to summarily adjudicate a claim
 22 for punitive damages unless the plaintiff comes forward with **clear and convincing evidence**
 23 supporting both the threshold issue, and every element of at least one of the two theories in
 24 order to establish corporate responsibility. *Basich v. Allstate Insurance Co.* (2001)
 25 87 Cal.App.4th 1112, 1121. All findings made under Civil Code § 3294(b), including, for
 26 example, whether an employee is a managing agent and whether a corporate employer
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 28

1 ratified any wrongful conduct, must be made by “clear and convincing” evidence.⁹ *Barton v.*
 2 *Alexander Hamilton Life. Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644.

3 Allen’s claim for punitive damages against RadioShack fails because (1) he cannot
 4 prove malice, oppression, or fraud; (2) none of the individuals involved in Allen’s termination
 5 were officers, directors, or managing agents of RadioShack; and (3) Allen cannot produce
 6 clear and convincing evidence to establish that any officer, director, or managing agent of
 7 RadioShack consciously disregarded his rights, or ratified any allegedly wrongful conduct.

8 **a. Allen Cannot Show Any Action That Meets the High Standard of**
 Malice or Oppression.

10 Allen cannot meet his initial burden of showing by clear and convincing evidence that
 11 any RadioShack employee acted with malice or oppression toward him.¹⁰ The only wrongful
 12 conduct he alleges is his termination by Ocampo, as well as several ambiguous comments
 13 allegedly made by Pattakos and Ocampo. The comments in question – “you may have a year
 14 left at RadioShack” and Ocampo’s references to Allen’s employees – are on their face
 15 insufficient as a matter of law to support a claim of punitive damages. Therefore, Allen must
 16 prove by clear and convincing evidence that Ocampo’s decision to terminate him was done
 17 with malice or oppression. This he cannot do. A finding of malice or oppression under Civil
 18 Code § 3294 requires “despicable” conduct. “[D]espicable’ is a powerful term that refers to
 19 circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’” *College Hosp.*, 8 Cal. 4th at 725.
 20 Mere tortious conduct, even discrimination, is not malice or oppression. *Patrick v. Maryland*
 21 Cas. Co.

(1990) 217 Cal.App.3d 1566, 1575; *Ackerman v. Western Elec. Co.* (N.D. Cal. 1986)
 22 643 F.Supp. 836, 857, aff’d, (9th Cir. 1988) 860 F.2d 1514, 1521 (“unfounded, misguided and

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 26 ⁹ To be clear and convincing, the evidence must be “sufficiently strong to command the
 unhesitating assent of every reasonable mind.” *In re Angelia P.* (1981) 28 Cal.3d 908, 919
 27 (internal quotation marks omitted). This requirement presents “a heavy burden, far in excess
 of the preponderance sufficient for most civil litigation.” *Hoffman v. Capital Cities/ABC, Inc.*
 (9th Cir. 2001) 255 F.3d 1180, 1186-87.

28 ¹⁰ Plaintiff does not allege that RadioShack acted fraudulently. See Complaint.

1 extremely ill-advised" discriminatory conduct was insufficient). Plaintiff has no evidence to
 2 meet this extremely high burden.

3 **b. Allen Cannot Show that Any Officer, Director, or Managing Agent
 4 Engaged in Malice or Oppression.**

5 Allen cannot show that any officer, director, or managing agent of RadioShack is
 6 "personally guilty" of wrongful conduct towards him. Cal. Civil Code § 3294(b). It is
 7 undisputed that Pattakos had returned to Texas, was no longer in Allen's chain of command,
 8 had no involvement in Allen's termination, and was not even informed about it. Ocampo Dec.
 9 ¶ 25. Allen makes no claim of any kind against Aybef – indeed, he has never even heard of
 10 him. However, Aybef did participate in that decision to terminate. Nevertheless, the
 11 undisputed evidence confirms that none of the three individuals involved in that decision –
 12 Ocampo, Gonsolin and Aybef – was an officer, director or managing agent of RadioShack.
 13 Ocampo Dec. ¶¶ 30-32 Exh. 10; see also Schrader Dec. ¶¶ 7-9, Exh. 1; Peterson Dec. ¶¶ 2,
 14 3, Exh. 1.

15 Supervisory employees are not managing agents under § 3294 (b) "unless they in fact
 16 exercise ***substantial discretion*** in their decision making capability." *White v. Ultramar Inc.*
 17 (1999) 21 Cal. 4th 563, 573 (emphasis added). The California Supreme Court clarified that
 18 this means substantial discretion over "formal policies that affect a substantial portion of the
 19 company and that are the type likely to come to the attention of corporate leadership."
 20 *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 715. Furthermore, "supervisors who have
 21 no discretionary authority over decisions that ultimately determine corporate policy would not
 22 be considered managing agents even though they may have the ability to hire or fire other
 23 employees." *White*, 21 Cal. 4th at 577; see also *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994)
 24 22 Cal.App.4th 397, 421-22. *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403,
 25 1436-37. It is undisputed that neither Ocampo, Gonsolin nor Aybef had any discretionary

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1 authority over decisions that ultimately determined RadioShack corporate policy.¹¹
 2 Accordingly, they were not managing agents of the company as a matter of law. *Roby*,
 3 47 Cal. 4th at 715.

4 **c. Allen Cannot Show Ratification, Authorization, or Disregard of His
 Rights or Safety by Any Officer, Director, or Managing Agent.**

5 Finally, Allen cannot show that any officer, director or managing agent ratified or
 6 authorized his termination, or allowed Ocampo to terminate him with conscious disregard for
 7 his rights or safety. Even if Ocampo's motivations were discriminatory or retaliatory, there is
 8 simply no evidence that anyone higher than RSD Aybef authorized or ratified the termination.
 9 Indeed, there is no evidence that anyone higher than Aybef even knew about it. See *Cruz v.*
 10 *Homebase* (2000) 83 Cal.App.4th 160, 168 (reversing punitive damages where no evidence
 11 that managing agent had actual knowledge that employee had acted maliciously). The
 12 undisputed facts establish that RadioShack RSDS's are not officers, directors, or managing
 13 agents. Schrader Dec. ¶ 7-9. Summary adjudication of Plaintiff's claim for punitive damages
 14 is thus appropriate.

15 **E. CONCLUSION**

16 For all the foregoing reasons, RadioShack respectfully requests that the Court grant
 17 this motion and enter judgment in its favor.

18 Dated: November 15, 2012

19 MILLER LAW GROUP
 20 A Professional Corporation

21 By: _____ /s/ Tracy Thompson
 22 Tracy Thompson
 23 Attorneys for Defendant
 24 RADIOSHACK CORPORATION

25 4829-0227-3553, v. 1

26 ¹¹ RadioShack's corporate policies regarding loss prevention, human resources, sales goals
 27 and strategies, salary and compensation rates were established at the company's
 28 headquarters in Fort Worth, Texas. Schrader Dec. ¶¶ 13, 16; Ocampo Dec. ¶¶ 18, 22;
 Peterson Dec. ¶ 3.